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IN THE

**Supreme Court of the United States**

OCTOBER TERM, 1969

No. 79

SANDRA ADICKES,

*Petitioner,*

—V.—

S. H. KRESS AND COMPANY,

*Respondent.*

**PETITIONER'S REPLY TO RESPONDENT'S  
STATEMENT AFTER REPLY**

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**PETITIONER'S REPLY TO RESPONDENT'S  
STATEMENT AFTER REPLY**

Petitioner has been criticized for her reply to respondent wherein she argues—and sets forth facts gleaned from the record in support of that argument—that respondent did not establish by sworn testimony prior to trial an adequate basis for the District Court to grant summary judgment against the petitioner on the conspiracy count.

It is true that respondent produced and had attached to Mr. Powell's deposition (Exhibit 4, A 146) an unsworn statement of Miss Jo Ann Baggett denying contact with the local police. The contents of this statement do not appear anywhere in the record on appeal, nor does the statement appear to have been before the court when it decided the motion for summary judgment. By contrast, the unsworn statements of Dolores Freeman and Irene Sullivan were brought to the trial court's attention in petitioner's

papers opposing the motion for summary judgment (R 925-927). At the time of making such unsworn statement, however, on November 18, 1964 and as of April 1, 1965, Miss Baggett was still employed by respondent Kress (A 9). Accordingly, it becomes even more significant that respondent chose not to produce a sworn statement by Miss Baggett to deny an inference which otherwise is a reasonable inference—that she or some other employee of Kress had contact with the policeman who came into the Kress store on August 14, 1964, when petitioner and her group were awaiting service at the lunch booth—or that, in the alternative, police headquarters were called or that such headquarters contacted Kress.

Accordingly, respondent's resistance to petitioner's desire to depose Miss Baggett and have her sworn testimony prior to trial on the motion for summary judgment partakes of even greater importance. Attached herewith as a further addendum to the joint appendix is Judge Tenney's ruling below preventing petitioner from deposing Miss Baggett under oath (see R 386, 387).

Hence, it was respondent's obligation as the moving party on application for summary judgment with the burden of proof, to offer all relevant evidence to convince the trial court that there was no substantial fact issue, the failure to either produce Miss Baggett as a witness or offer her affidavit controverting the inferences in the record cannot be overlooked. Respondent did not offer the unsworn statement at the time of the motion for summary judgment, but now seeks to rely on it to rebut petitioner's argument even though respondent had exclusive access to Miss Baggett.

It is unfortunate that the courts below regarded each of the issues urged by petitioner from the narrowest view.

The proper place for respondent to place such testimony as it proffers here—from outside the record on appeal—is before a trial court where it would have to be placed under oath and would be subjected to cross examination and to controverting evidence from other parties. For that right and privilege petitioner comes before this Court. The summary judgment by Judge Bonsal on the issue of conspiracy that so narrowed petitioner's case before the trial court should be reversed along with the latter's mistaken ruling on the petitioner's surviving claim.

Respectfully submitted,

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November 1969.





# ADDENDUM TO JOINT APPENDIX

[R 386]

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF NEW YORK  
64 Civ. 3426

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SANDRA ADICKES,

*Plaintiff,*

—against—

S. H. KRESS & COMPANY,

*Defendant.*


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## MEMORANDUM-ENDORSEMENT

TENNEY, J.

Plaintiff moves herein, pursuant to Rule 37 of the Federal Rules of Civil Procedure, to strike defendant's answer for its failure to produce a Miss Jo Ann Baggett for her deposition. In the alternative, plaintiff would have this Court compel defendant to produce Miss Baggett for her deposition in the capacity of a managing agent.

This is an action for damages for a claimed violation of the Civil Rights Act of 1871 (42 U.S.C.A. Section 1983).

The action arises out of the defendant's refusal to serve plaintiff at its lunch counter store in Hattiesburg, Mississippi, and her subsequent arrest by the Hattiesburg police department for vagrancy.

While Miss Baggett may be an employee of S. H. Kress and manager of the food department, she was under the



close supervision of Mr. Powell, the store manager, as was indicated upon his oral deposition. It was also indicated on his deposition that Miss Baggett was without power to make managerial decisions and that it was his decision that plaintiff not be served at the lunch counter. Plaintiff has submitted no evidence to show otherwise.

"A managing agent, as distinguished from one who is merely 'an employee', is a person invested by the corporation with general powers to exercise his judgment and discretion in dealing with corporation matters; he does not act 'in an inferior capacity' under close supervision or direction of 'superior authority'." *Krause v. Erie R. Co.*, 16 F.R.D. 126, 127 (S.D.N.Y. 1954).

[R 387]

Plaintiff not having established that Miss Baggett was a managing agent, the motions to strike the defendant's answer and to compel defendant to produce Miss Baggett for oral deposition are denied.

SO ORDERED

Dated: New York, N. Y.  
August 5, 1965

S/ CHARLES M. TENNEY  
U.S.D.J.

